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No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1967

STEPHEN R. EAGAR, ET AL., *Petitioners*

vs.

MAGMA COPPER COMPANY

Petition of Respondent for Rehearing

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Petition of Respondent for Rehearing

By the decision of December 11, 1967, this Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit in the captioned case. Respondent, pursuant to Rule 58 of the Rules of this Court, respectfully petitions the Court for rehearing.

Petitioners filed a Petition for a Writ of Certiorari in this case, and Respondent filed a Brief in Opposition. The Court, divided five to three, granted the Petition for a Writ of Certiorari and at the same time summarily reversed the judgment of the Court below without receiving additional briefs from either party.

Respondent does not contend that this matter was inadequately presented to the Court on the briefs filed in connection with the Petition for Writ of Certiorari. Little could be added on the merits by additional briefs or oral argu-

ment. However, because the Court was so closely divided on the question presented and because of the serious implication left by this decision that the "other benefits" section of the Act[1] is of no significance, we respectfully request that this Court reconsider its decision.

The majority of this Court ruled, without giving an opinion, that the case was controlled by *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225. However, the *Accardi* case involved pension benefits which were based on *seniority*. This Court noted in *Accardi*—

> "In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad." . . . "We think it clear that the amount of these allowances is just as much a prerequisite of seniority as the more traditional benefits such as work preference and order of layoff and recall." (383 U.S. 225 at p. 230)

Thus, severance payments, which were in question in the *Accardi* case, were ruled to be based on seniority, which are governed under the provisions of the Act providing for reinstatement "without loss of seniority". After ruling that the benefits in question in *Accardi* were really seniority benefits, the Court found it unnecessary to discuss the clause in Section 9(c) of the Act relating to "insurance or other benefits".

> "What we have said makes it unnecessary to discuss in detail the Court of Appeals' holding that these allowances did not come within the concepts of 'seniority, status, and pay' and thus were governed not by § 8(b) (B) and the part of § 8(c) relating to seniority but rather by the clause in § 8(c) stating that returning veterans 'shall be entitled to participate in insurance or

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1. Universal Military Training and Service Act, 62 Stat. 615, as amended, 50 U.S.C. App. § 459.

other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . .' " (383 U.S. 225 at p. 231)

In contrast, however, the case at hand in no way concerns seniority, but deals with eligibility for vacation and holiday pay. In the *Accardi* case, the veterans did not receive credit for time spent in the Armed Forces in computing subsequent severance allowance. Our case does not concern this problem. The veterans here were given full credit for the length of time spent in the Armed Forces in determining the amount of subsequent vacations. Respondent Magma, therefore, complied in all respects with the "seniority" provision of the Act.

Vacation and holiday benefits are typical fringe benefits in labor agreements. It would seem that if Section 9(c), relating to "insurance or other benefits", has any application it would be in determining eligibility for these fringe benefits.

In *Accardi*, the Court noted:

> "The Government contends that the 'other benefits' clause of § 8(c) was added to the bill 'for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence.' The legislative history referred to in the Government's brief persuasively supports such a purpose." (383 U.S. 225 at p. 231)

Respondent complied with the "other benefits" clause. In determining their eligibility for vacations and holidays, petitioners were treated the same as all other employees on furlough whether for military or nonmilitary reasons. The Act does not require that they be given preferential treatment.

Because the majority of the Court ruled that this case is controlled by the *Accardi* decision, we are fearful that the Department of Labor and Veterans' Administration in administering the Universal Military Training and Service Act will now contend that the "other benefits" clause of the Act is meaningless even though Section 9(c) speaks of both "seniority" and "insurance or other benefits". Under such an interpretation, the next step could well be that returning veterans will claim all vacations, holidays, paid sick leave, group, hospital, medical and life insurance and any other fringe benefits which they would have received during their absence to the Armed Forces regardless of whether other furloughees are eligible for these benefits. Surely the Court did not intend this.

Therefore, we respectfully request that this Court reconsider its decision in this case and affirm the judgment of the Court below.

HOWARD A. TWITTY
Attorney for Respondent

RALPH B. SIEVWRIGHT
Of Counsel
December 22, 1967

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded and is presented in good faith and not for the purposes of delay.

HOWARD A. TWITTY

PER CURIAM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

EAGAR ET AL. *v.* MAGMA COPPER CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 659. Decided December 11, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Accardi* v. *Pennsylvania Railroad Co.*, 383 U. S. 225.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, dissenting.

Petitioner Eagar [1] began working for Magma Copper Company March 12, 1958, and left to enter military service just shy of one year later, March 6, 1959. After being honorably discharged, Eagar promptly resumed his employment with Magma, May 2, 1962. He seeks vacation pay for the work year following March 12, 1958, and for the Memorial Day and Independence Day holidays in 1962, which followed his re-employment.

Under Magma's collective bargaining agreement with petitioners' union, paid vacations are provided at the end of a work year if the employee works 75% of the shifts available to him in that year and is employed with Magma on the one-year anniversary date. Employees who get paid holidays must have worked the shift before and the shift after the holiday and have been on Magma's payroll continuously for three months before the holiday.

[1] There are three other employees of respondent Magma Copper in addition to Eagar on whose behalf the Department of Justice has sought review. The Solicitor General and respondent agree that the facts in Eagar's case are representative of the other petitioners, and this Court is asked to resolve the legal dispute on the basis of these facts.

Although Eagar had worked 75% of the shifts for the year March 12, 1958, to March 12, 1959, and had worked the shifts before and after Memorial Day and Independence Day in 1962, Magma denied him benefits. Eagar was not, Magma claims, in its employ on March 12, 1959, nor had he been on the payroll three straight months prior to Memorial and Independence days in 1962.

The majority hold that Magma has violated § 9 (c) of the Universal Military Training and Service Act, 62 Stat. 615, as amended, 50 U. S. C. App. § 459, which provides, *inter alia*, that a returning serviceman such as Eagar who is re-employed "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, [and] shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees *on furlough or leave of absence* in effect with the employer at the time such person was inducted into such forces . . . ."[2] (Italics added.)

Section 9 (c) speaks both of "seniority" and of "insurance or other benefits." In dealing with seniority problems under a like statutory provision, we held that the employee is to be treated as if he had kept his position continuously during his stint in the Army. *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225, 228; *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284–285.

But this case does not concern "seniority." No employee of Magma, it appears, regardless of how long he has been with the firm, gets paid vacation if he is not on the payroll at his work-year anniversary date. No

[2] Section 9 (c) also provides:

"It is declared to be the sense of the Congress that any person who is restored to a position in accordance with . . . this section should be so restored in such manner so as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

employee gets a paid holiday unless he has been with Magma for the three preceding months. The *length* of vacation and the *amount* of vacation and holiday pay Magma gives do turn on seniority. But petitioners do not contest Magma's assertion that it does figure the length of vacation for returning servicemen as though they had been constantly on the payroll during their tour of duty in the military. In considering the employee's eligibility for vacation and holiday pay, since seniority is not involved, the courts must apply the "other benefits" clause of § 9 (c). See *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 738 (C. A. 2d Cir.). As noted, these benefits are accorded as if the employee were on "furlough or leave of absence" while in service. That is precisely what Magma has done.

Accardi admonishes the courts to give the term "seniority" a broad interpretation. 383 U. S., at 229. But *Accardi* did not involve the "other benefits" clause, which must be applicable in this clear fringe-benefits case if at all.[3] As Judge Learned Hand said, "[O]bviously the considerations which might make it proper that service in the Army should not affect a man's seniority are utterly different from those which should count in computing vacations." *Dwyer* v. *Crosby*, 167 F. 2d 567, 570 (C. A. 2d Cir.). I would affirm the judgment below.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[3] The "sense of Congress" proviso in § 9 (c) does not indicate a different result. The language was added in 1948 when the "seniority" and "other benefits" provisions were re-enacted upon the expiration of § 8 of the Selective Training and Service Act of 1940. The "sense of Congress" is concerned with employee "status," see n. 2, *supra*. But if "status" were meant to include eligibility for fringe benefits, Congress would not have left unchanged the explicit provision that "other benefits" are to be dispensed as if the returning serviceman had been on leave of absence.